

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES I. SCHAAP,

3:19-cv-00765-RCJ-CLB

Plaintiff,

v.

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

THOMAS B. MODLY, et al.,

Defendants.

Before the court is Plaintiff James Schaap's ("Schaap"), application to proceed *in forma pauperis* (ECF No. 1), and *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the court recommends that Schaap's *in forma pauperis* application (ECF No. 1) be granted, and his complaint (ECF No. 1-1) be dismissed, with prejudice.

I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial

¹ This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 affidavit disclosing the applicant's income, assets, expenses, and liabilities.” LSR 1-1. “[T]he
 2 supporting affidavit [must] state the facts as to [the] affiant’s poverty with some particularity,
 3 definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (quotation
 4 marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits
 5 of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

6 A review of the application to proceed IFP reveals Schaap cannot pay the filing fee;
 7 therefore, the court recommends that the application (ECF No. 1) be granted.

8 **II. SCREENING STANDARD**

9 Prior to ordering service on any defendant, the Court is required to screen an *in forma*
 10 *pauperis* complaint to determine whether dismissal is appropriate under certain
 11 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
 12 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint for
 13 the enumerated reasons). Such screening is required before a litigation proceeding *in forma*
 14 *pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507 (9th Cir.
 15 2015).

16 “[T]he court shall dismiss the case at any time if the court determines that – (A) the
 17 allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or malicious; (ii)
 18 fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against
 19 a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

20 Dismissal of a complaint for failure to state a claim upon which relief may be granted
 21 is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
 22 tracks that language. When reviewing the adequacy of a complaint under this statute, the
 23 court applies the same standard as is applied under Rule 12(b)(6). See, e.g., *Watison v.*
 24 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a
 25 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii)
 26 is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a
 27 claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. See

1 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

2 The Court must accept as true the allegations, construe the pleadings in the light
3 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v.*
4 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints
5 are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v.*
6 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

7 A complaint must contain more than a "formulaic recitation of the elements of a cause
8 of actions," it must contain factual allegations sufficient to "raise a right to relief above the
9 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
10 must contain something more. . . than. . . a statement of facts that merely creates a suspicion
11 [of] a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a
12 minimum, a plaintiff should include "enough facts to state a claim to relief that is plausible
13 on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

14 A dismissal should not be without leave to amend unless it is clear from the face of
15 the complaint the action is frivolous and could not be amended to state a federal claim, or
16 the district court lacks subject matter jurisdiction over the action. *See Cato v. United States*,
17 70 F.3d 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

18 **III. SCREENING OF COMPLAINT**

19 Schaap brings this action against Defendants Acting Secretary of the United States
20 Navy, Thomas Modly and Secretary of the United States Navy, Richard V. Spencer. (ECF
21 No. 1-1.) Schaap seeks judicial review under the Administrative Procedures Act regarding
22 his request that a Purple Heart Medal be added to his service record. (*Id.*) For the reasons
23 discussed below, the court finds that Schaap's complaint should be dismissed as frivolous
24 because its claims are duplicative of claims in another of Schaap's pending actions.

25 Courts are not required to entertain duplicative or redundant lawsuits and may
26 dismiss them as frivolous or malicious under § 1915(e). *See Cato*, 70 F.3d at 1105 n.2
27 (noting that courts may dismiss under § 1915 a complaint that merely repeats pending or

1 previously litigated claims); see also *Aziz v. Burrows*, 976 F.2d 1158, 1158 (8th Cir. 1992)
2 (“district courts may dismiss a duplicative complaint raising issues directly related to issues
3 in another pending action brought by the same party”); *Adams v. Cal. Dep’t of Health Servs.*,
4 487 F.3d 684, 688 (9th Cir. 2007) (“Plaintiffs generally have ‘no right to maintain two
5 separate actions involving the same subject matter at the same time in the same court and
6 against the same defendant.’”), *overruled in part on other grounds by Taylor v. Sturgell*, 553
7 U.S. 880 (2008).

8 The claims raised in Schaap’s complaint against Modly are directly related—and in
9 fact identical—to those raised in another action by Schaap, Case No. 3:19-cv-00042-RCJ-
10 CLB. The complaints in both cases are identical and the only difference between the case
11 before this court and Case No. 3:19-cv-00042 is that Thomas Modly is named as a
12 defendant. Otherwise, the actions are entirely duplicative. Accordingly, such claims are
13 improperly raised in the complaint, as they are frivolous and should be dismissed with
14 prejudice.

15 **IV. CONCLUSION**

16 Consistent with the above, the court finds that dismissal is warranted under 28 U.S.C.
17 § 1915(e)(2)(B)(i). Because amendment would be futile, the dismissal should be with
18 prejudice. See *Cato*, 70 F.3d at 1106.

19 The parties are advised:

20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
21 Practice, the parties may file specific written objections to this Report and Recommendation
22 within fourteen days of receipt. These objections should be entitled “Objections to
23 Magistrate Judge’s Report and Recommendation” and should be accompanied by points
24 and authorities for consideration by the District Court.

25 2. This Report and Recommendation is not an appealable order and any notice
26 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
27 Court’s judgment.

1 **V. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Schaap's application to proceed *in forma*
3 *pauperis* (ECF No. 1) be **GRANTED**;

4 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** Schaap's complaint (ECF No.
5 1-1); and,

6 **IT IS FURTHER RECOMMENDED** that the complaint (ECF No. 1-1) be **DISMISSED**,
7 **WITH PREJUDICE**.

8 **DATED:** March 23, 2020.



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10 **UNITED STATES MAGISTRATE JUDGE**
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